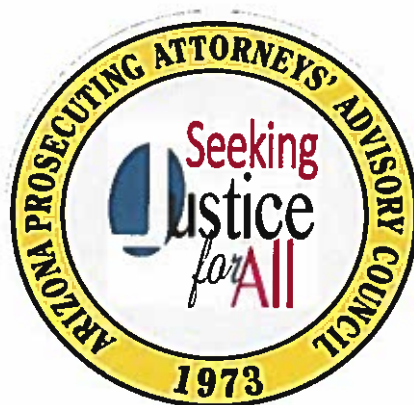


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**ROUND UP THE USUAL SUSPECTS: The Law of
Eyewitness Identifications**

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Round Up the Usual Suspects: The Law of Eyewitness Identifications

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Goals

1. Provide practical tools for admitting eyewitness identifications at trial.
2. Explore some of the ethical implications surrounding eyewitness identifications.

Outline

- U.S. Supreme Court history
- Current state of the law
- Arizona differences
- Emerging and ethical issues

Introduction

- [What do we mean when we're talking about eyewitness identifications?]

Introduction

- Lineup:



Introduction

- Lineup:



Introduction

- Showup:



Introduction

- So what's the problem?
- Examples from *United States v. Wade*, 388 U.S. 218, 232–33 (1967):

Introduction



Introduction



Introduction



Central Concerns

- **(1) Reliability:** Some identification procedures are more reliable than others.
 - Lineups are more reliable than showups.
 - Non-suggestive lineups are better than suggestive ones.
- **(1)(A) Contamination:** Once a witness has identified a subject, they're likely to keep identifying them, even if the initial identification was wrong.
- **(2) Choice:** Defendant has no choice in how lineup is constructed. Whether to use reliable or unreliable procedures is entirely in hands of police.

Central Concerns

- "[I]mproper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. . . . Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. . . ."

Central Concerns

- "... This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. . . . Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." *Simmons v. United States*, 390 U.S. 377, 383-84 (1968)

Outline

- **U.S. Supreme Court history**
- Current state of the law
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Stovall v. Denno
388 U.S. 293 (1967)

- Husband stabbed to death in kitchen of his home.
- Wife seriously wounded and hospitalized for major surgery.
- Theodore Stovall apprehended as suspect.

Stovall v. Denno
388 U.S. 293 (1967)

- Police are afraid wife might die, so they bring to her hospital bed for identification.
- Stovall is the *only* person brought for identification (showup).
- Handcuffed to police officer (suggestive).

Stovall v. Denno
388 U.S. 293 (1967)

- Wife IDs Stovall at hospital. Later gets better and IDs him again at trial.
- Question: Whether this procedure "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [Stovall] was denied due process of law."

Stovall v. Denno
388 U.S. 293 (1967)

- Answer: No.
- "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned."
- **BUT**, it was okay in this case because there was no other option.

Stovall v. Denno
388 U.S. 293 (1967)

- No one knew how long wife might live, so "an immediate hospital confrontation was imperative" and "the police followed the only feasible procedure" by taking Stovall to the hospital room.

Stovall v. Denno
388 U.S. 293 (1967)

- This is beginning of two main themes in Supreme Court's jurisprudence.
 - (1) The Court is concerned about reliability of suggestive identifications (particularly showups).
 - (2) The Court is willing to tolerate suggestive identifications if police acted properly or had no other choice.

Simmons v. United States 390 U.S. 377 (1968)

- Bank robbery.
- FBI agents show six "mostly...group photographs" of Simmons to five bank employees.
- All five ID Simmons.

Simmons v. United States 390 U.S. 377 (1968)

- Later, witnesses all identify Simmons at trial, but photographs are not introduced
- Highlights contamination rationale:
 - Did showing photos before trial contaminate the IDs made during trial?

Simmons v. United States 390 U.S. 377 (1968)

- Holding: Identification admissible :
- FIRST, there was NO POLICE MISCONDUCT:
 - "A serious felony had been committed. The perpetrators were still at large. . . . It was essential for the FBI agents swiftly to determine whether they were on the right track, so that they could properly deploy their forces in Chicago and, if necessary, alert officials in other cities. The justification for this method of procedure was hardly less compelling than that which we found to justify the "one-man lineup" in *Stovall*."
 - Choice rationale: Police didn't have other options

Simmons v. United States 390 U.S. 377 (1968)

- SECOND, it was reliable:
 - Lighting good.
 - Simmons not wearing a mask.
 - There were other people in many of the photographs.
 - FBI didn't make suggestive statements.
 - Witnesses all IDed the same guy.
 - Witnesses showed no doubt during cross-examination.

Foster v. California 394 U.S. 440 (1969)

- Armed robbery committed by a man in a leather jacket.
- Police hold two lineups.



Foster v. California 394 U.S. 440 (1969)

- First lineup:
 - Three subjects, including defendant.
 - Defendant is the only one wearing a leather jacket.



Foster v. California 394 U.S. 440 (1969)

- First lineup (cont.):
 - Witness says he "thought" defendant was the perpetrator but wasn't sure.
 - Defendant taken out of the lineup to stand alone in front of the witness.
 - Witness says he he's still "not sure" if defendant was the perpetrator.

Foster v. California 394 U.S. 440 (1969)

- Second lineup (5-10 days later):
 - Five subjects, but defendant is the only repeat subject:



Foster v. California 394 U.S. 440 (1969)

- Second lineup (cont.):
 - This time, the witness is "convinced" that the defendant is the perpetrator.
 - Contamination.

Foster v. California 394 U.S. 440 (1969)

- Holding: ID **NOT admissible**.
- "[T]his identification procedure made it all but inevitable that [the victim] would identify petitioner whether or not he was in fact 'the man.' ... This procedure so undermined the reliability of the eyewitness identification as to violate due process."

Interlude

- Supreme Court primarily concerned about officers acting improperly.
- Next question: What is *the* remedy if the police use improperly suggestive procedure.

Interlude

- Some lower courts say you should suppress *all* improper IDs to encourage police to do the right thing.
 - E.g., if police use showup when they could have done a lineup, the ID is *automatically* suppressed.
 - Similar to Fourth Amendment.
- That leads to next big case ...

Neil v. Biggers, 409 U.S. 188 (1972)

- Police do a showup.
- Federal district court suppresses identification because police should have done a lineup instead.

Neil v. Biggers, 409 U.S. 188 (1972)

- Supreme Court reverses and **REJECTS** the idea that "unnecessary suggestiveness alone requires the exclusion of evidence."
- Even if police screw up, an identification is admissible if it is still sufficiently reliable.

Neil v. Biggers, 409 U.S. 188 (1972)

- After analyzing various factors, Court concludes identification was sufficiently reliable to be admitted.
- Court reiterates same factors in *Manson v. Brathwaite*, 432 U.S. 98 (1977). As a result, these factors are often called *Biggers* factors, or sometimes *Manson* factors.

Perry v. New Hampshire,
565 U.S. 228 (2012)

- Witness reports someone trying to break into cars in parking lot of apartment building
- Arriving officer sees "Barion Perry standing between two cars" with "two car-stereo amplifiers in his hands."
- The officer asked Perry where the amplifiers came from.
- Answer: "[I] found them on the ground."

Perry v. New Hampshire,
565 U.S. 228 (2012)

- One officer detains Perry, and another goes inside to interview a witness.
- Officer asks the witness to describe the suspect.
- She "pointed to her kitchen window and said the person she saw breaking into [the] car was standing in the parking lot, next to the police officer."
- Perry arrested. About a month later, the witness shown a photo lineup and couldn't identify Perry.

Perry v. New Hampshire,
565 U.S. 228 (2012)

- Question: Should an arguably unreliable lineup be excluded even if it was not made "under suggestive circumstances not arranged by the police?"

Perry v. New Hampshire, 565 U.S. 228 (2012)

- ANSWER: NO. If police didn't arrange the suggestive procedure, then it doesn't matter if it was reliable or not.
- Begins by summarizing the history we've just reviewed.
- Then holds that any doubts about reliability are questions for the JURY, not the judge.

Outline

- U.S. Supreme Court history
- **Current state of the law**
- Arizona differences
- Emerging and ethical issues

Summary

	Police Conduct Proper	ID Reliable	Admissible?
<i>Stovall v. Denno</i>	✓	?	Yes
<i>Simmons v. US</i>	✓	✓	Yes
<i>Foster v. California</i>	✗	✗	No
<i>Nel v. Biggers</i>	✗	✓	Yes
<i>Perry v. New Hampshire</i>	✓	✗	Yes

Supreme Court's Two Step Test

- **Step 1: Necessity.**
- **Step 2: Reliability.**

Step 1: Necessity

- *Determines whether police action was proper.*
- "[T]he defendant has the burden of showing that the eyewitness identification was derived through 'impermissibly suggestive' means." *Perry*, 132 S. Ct. at 733.
- To do so, the defendant must show the identification procedure was "both suggestive and unnecessary." *Perry*, 132 S. Ct. at 724. (Choice rationale).
- If defendant fails to show both, then the ID was proper, and the court need not consider reliability.
- Consider three common situations: ...

Necessity (Example 1: ID Not Suggestive)

- Situation 1: Everything goes right, and police conduct a fair and non-suggestive lineup.
- ID is admissible, even if other factors might undermine its reliability.

Necessity (Example 1: ID Not Suggestive)

- For instance:
 - A witness IDs the defendant in a non-suggestive lineup, but the defendant argues the witness is biased and has a motive to lie.
 - ID should be admitted. Reliability concerns can be addressed at trial through argument, evidence, and cross-examination.

Necessity (Example 2: No State Action)

- Situation 2: A suggestive ID occurs, but the State didn't arrange it.
- Typically happens when the circumstances accidentally create a one-man showup.

Necessity (Example 2: No State Action)

- Examples:
 - *Perry v. New Hampshire*, 565 U.S. 228 (2012): Witness happens to observe suspect in the parking lot.
 - *State v. Goudeau*, 239 Ariz. 421, 455–56, ¶¶ 134–35 (2016): Witnesses ID defendant from photos, videos, and sketches shown on the news.
 - *State v. Farde*, 233 Ariz. 543, 556–57, ¶¶ 28–34 (2014): Witness can't identify defendant in a lineup, but later shows up to pretrial hearing and identifies him there.

Necessity (Example 2: No State Action)

- Again, ID should be admitted, and the reliability concerns should be addressed by the jury, not the judge.

Necessity (Example 3: Suggestive but Necessary)

- Situation 3: A suggestive ID occurs, but the State had no other choice.
- Typically happens when police use a one-man showup because there was no time to arrange a lineup.

Necessity (Example 3: Suggestive but Necessary)

- Examples:
 - *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967): One-man showup at the hospital permissible because witness might die.
 - *Simmons v. United States*, 390 U.S. 377, 384-85 (1968): Suggestive photo array permissible because bank robbers were on the loose and "[i]t was essential for the FBI agents swiftly to determine whether they were on the right track, so that they could properly deploy their forces in Chicago and, if necessary, alert officials in other cities."

Necessity (Example 3: Suggestive but Necessary)

- Example: *United States v. Sanders*, 708 F.3d 976 (7th Cir. 2013).
- Kidnapping victim released, but one kidnapper still on the loose.
- Officers find the kidnapper's car containing photos of the defendant at a birthday party "with various combinations of family and friends." Officer show photos to witness, who IDs defendant.
- Holding: Assuming that photos were suggestive, police action was still proper under *Simmons* because suspect was on the loose, and constructing lineup would have wasted critical time.

Necessity (Example 3: Suggestive but Necessary)

- Example: *United States v. Holiday*, 457 F.3d 121, 125–26 (1st Cir. 2006)
- Suspect had unusual hairstyle and discoloration of facial skin.
- Officers searched database of 300,000 photos but couldn't find enough other people who looked like him.
- No improper conduct b/c no other practical alternatives.
- 2 Wayne R. LaFare, *Crim. Proc.* § 7.4(b) (4th ed. Dec. 2016 update.)

Step 2: Reliability

- If police engaged in misconduct, the court must determine whether it was prejudicial.
- **Standard:** "a very substantial likelihood of irreparable misidentification." *Perry*, 132 S. Ct. at 720.
- In other words, the ID need only be *sufficiently reliable* to be admissible. Any lingering doubts are jury questions.

Reliability

- **Biggers factors:**
 - (1) opportunity of the witness to view the criminal at the time of the crime
 - (2) witness' degree of attention
 - (3) accuracy of his prior description of the criminal
 - (4) level of certainty demonstrated at the confrontation
 - (5) time between the crime and the confrontation
- May also consider *any other relevant factors*. See *Biggers*, 409 U.S. at 199-200; *State v. Nazarehian*, 231 Ariz. 21, 24, ¶ 6, n.2 (App. 2012).

Reliability Biggers factors

- **Factor 1: Opportunity to view subject**
 - Common sense: lighting, obscured view, distractions, eyesight, etc.
 - Obviously, the longer the better.
 - However ...

Reliability Biggers factors

- **Factor 2: Witness' degree of attention**
 - High degree of attention can make up for short opportunity to view.
 - See *State v. McLaughlin*, 133 Ariz. 458, 462 (1982) (identification reliable where, "[a]lthough none of the witnesses had an opportunity to view the culprit for long, they all had a reason to have their attentions riveted on him"); *State v. Trujillo*, 120 Ariz. 527, 530, (1978) (opportunity to view defendant for "only a matter of seconds" sufficient to render the identification reliable because "her attention was immediately drawn" to defendant committing the crime).

Reliability Biggers factors

- Factor 3: Accuracy of prior description
 - Does the subject match the witness's prior description?
 - If the initially witness says the perpetrator was 5' 3", but then IDs someone who's 6' 5" at the lineup, that's a bad sign.

Reliability Biggers factors

- Factor 3: Accuracy of prior description
 - Need not be perfect.
 - See *State v Dixon*, 153 Ariz. 151, 152-155 (1987) (finding eyewitness identification to be reliable even though the witness misremembered the type and color of shirt the defendant was wearing and misjudged the defendant's height by four inches).
 - Did the witness refuse to identify anybody at a prior lineup where the defendant was not present?
 - See *Biggers*, 409 U.S. at 201. ("[T]he victim made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup.")

Reliability Biggers factors

- Factor 4: Level of certainty
 - Self-explanatory.
 - Did witness hesitate?
 - Did witness ID immediately?
 - Did witness give numerical or subjective assessment of how certain they were?

Reliability

Biggers factors

- Factor 5: Passage of time

- The less time between the crime and the identification is better.
- Times weighing in favor of reliability:
 - 30 minutes. *State v. Smith*, 146 Ariz. 491, 498 (1985).
 - "[A] few hours." *State v. Dixon*, 153 Ariz. 151, 155 (1987).
 - "[L]ess than two days." *State v. Cañez*, 202 Ariz. 133, 150, ¶ 48 (2002).

Reliability

Biggers factors

- Factor 5: Passage of time

- Even lengthy delays aren't fatal:
 - Five months. *State v. Schilleman*, 125 Ariz. 294, 297 (1980).
 - Seven months. *Neil v. Biggers*, 409 U.S. 188, 201 (1972).
 - Over one year. *Lavonia v. Lynaugh*, 845 F.2d 493, 500 (5th Cir. 1988).
 - "[O]ver 30 years." *United States v. Warku*, 800 F.3d 1195, 1206 (10th Cir. 2015).

Reliability

Biggers factors

- Other relevant factors:

- Previous familiarity with the suspect. See *Haliym v. Mitchell*, 492 F.3d 680, 706 (6th Cir. 2007).
- Police officers. See *State v. Williams*, 144 Ariz. 433, 440 (1984) (officers "may be more finely trained in identification and less susceptible to suggestiveness" than ordinary witnesses).
- Military training. See *State v. Foddrell*, 269 S.E.2d 854, 857 (W.Va. 1980) (considering fact that the witness "was a former serviceman" who "served as a military policeman" as a factor indicating reliability).

Supreme Court's Two-Step Test

- Summing up:
- Eyewitness IDs can be excluded, but only where:
 - (1) the police messed up; and
 - (2) the ID was unreliable.
- Courts are willing to tolerate a substantial amount of unreliability, in part because they know the issue will be addressed before the jury at trial.

Special Consideration: Post-Charge Identifications

- Normally an identification procedure takes place *before* charges are filed, when police are still investigating the case.
- A *post-charge* lineup is a critical stage in the proceeding, and the suspect has constitutional right to have an attorney present. See *United States v. Wade*, 388 U.S. 218 (1967).

Special Consideration: What About In-Court Identifications?

- In-court identifications look a lot like showups.



Special Consideration: What About In-Court Identifications?

- Does that mean that the same rules apply to in court identifications?
- Answer: **NO.**
- Remember, the reason for the due process check is to deter *improper police conduct*. Identification of a defendant at trial is not "improper" and involves no "police conduct."

Special Consideration: What About In-Court Identifications?

- So, if there was no police misconduct *before* trial, there is no basis for precluding in-court identifications *during* trial.

Special Consideration: What About In-Court Identifications?

- *State v. Gaudreau*, 239 Ariz. 421, 437, ¶ 141 (2016) ("Because the identifications by [the witnesses] occurred as part of formal court proceedings and were not influenced by improper law enforcement activity, the trial court did not abuse its discretion in allowing their in-court identifications.")
- *State v. Nottingham*, 231 Ariz. 21, 25, ¶ 10 (App. 2012) ("The pretrial identification here occurred during criminal trial proceedings, was subject therefore to all the protections therein, and was permitted and supervised by a neutral, detached arbiter, the trial judge. Under such circumstances, the core rationale stated in *Perry* for precluding certain in-court identifications—that doing so serves the salutary function of deterring law enforcement misconduct—has no application.")

Special Consideration: What About In-Court Identifications?

- Other cases:
 - *United States v. Whatley*, 719 F.3d 1206, 1216 (11th Cir. 2013); *State v. Stevens*, 860 N.W.2d 717, 728 (Neb. 2015); *State v. Hickman*, 330 P.3d 551, 571–72 (Or. 2014), modified on reconsideration, 343 P.3d 634 (Or. 2015).

Special Consideration: Admissibility

- Special hearsay exclusion for statements of prior identification in Ariz. R. Evid. 801(d)(1)(C).
- Statement is not hearsay if:
 - (1) "[t]he declarant testifies and is subject to cross-examination," and
 - (2) the statement "identifies a person as someone the declarant perceived earlier."

Special Consideration: Admissibility

- Rule 801(d)(1)(C) also applies to witnesses who testify about someone else's identification. *United States v. Eley*, 656 F.2d 507, 508 (9th Cir. 1981).
- So if a witness IDs a suspect at a lineup, you can call the cops to testify directly about the ID, so long as you also call the witness, too.

Special Consideration: Experts

- Expert **cannot** testify that a particular witness is or is not credible. *State v. Lindsey*, 149 Ariz. 472, 475 (1986).
- But expert **may** be able to testify about general factors affecting reliability. See, e.g., *State v. Chapple*, 135 Ariz. 281, 292–97 (1983).
 - In other words, "cold expert" testimony.

Special Consideration: Experts

- Historically, reversal will occur only in "peculiar circumstances": "in the usual case [our supreme court] will support the trial court's discretionary ruling on the admissibility of expert testimony on eyewitness identification." *State v. Via*, 146 Ariz. 108, 123 (1985); see also *State v. Roscoe*, 184 Ariz. 484, 495 (1996).
- But see *State v. Salazar-Mercado*, 234 Ariz. 590 (2014) (admitting cold expert testimony explaining "behaviors commonly exhibited by child sexual abuse victims").
 - In recent years, courts have been very permissive in letting us admit cold-expert testimony in child abuse cases.
 - You might be running risk if you oppose admission of a qualified ID expert.

Outline

- U.S. Supreme Court history
- Current state of the law
- **Arizona differences**
- Emerging and ethical issues

Three Key AZ Differences

- (1) Arizona imposes a jury instruction requirement. (*Dessureault*).
- (2) Arizona prefers (but do not require) pretrial reliability hearings. (*Dessureault*).
- (3) Arizona courts are skeptical of Step 1 (Necessity) of due process analysis.

Three Key AZ Differences

- (1) Arizona imposes a jury instruction requirement. (*Dessureault*).
- (2) Arizona prefers (but do not require) pretrial reliability hearings. (*Dessureault*).
- (3) Arizona courts are skeptical of Step 1 (Necessity) of due process analysis.

State v. Dessureault, 104 Ariz. 380 (1969)

- 1967: *Stovall* (hospital room)
- 1968: *Simmons* (bank robber photos)
- Apr. 2, 1969: *Foster* (leather jacket)
- Apr. 30, 1969: *Dessureault* decided

State v. Dessureault, 104 Ariz. 380 (1969)

- Robert Dessureault robs a Circle K in Phoenix.
- Witness tells police that the perpetrator had a moustache and beard.
- Clerk identifies Dessureault in 4 person lineup where Dessureault is the only person with a moustache and beard.
- **HOLDING:** Lineup was improperly suggestive, but resulting ID was sufficiently reliable to be admitted.

State v. Dessureault, 104 Ariz. 380 (1969)

- Court sets up several requirements.
- **(1) Pretrial hearing**
 - Upon request, trial court must hold hearing outside presence of jury to determine:
 - (1) Whether identification was suggestive;
 - (2) Whether identification was nevertheless reliable.

State v. Dessureault, 104 Ariz. 380 (1969)

- **(2) Jury instructions**
 - Upon request, the court must instruct the jury that "it must be satisfied beyond a reasonable doubt that the in-court identification was independent of the previous pretrial identification or if not derived from an independent source, it must find from other evidence in the case that the defendant is the guilty person beyond a reasonable doubt."

State v. Dessureault, 104 Ariz. 380 (1969)

- (2) Jury Instructions

- RAJI Standard Criminal 39:
 - "The State must prove beyond a reasonable doubt that the in-court identification of the defendant at this trial is reliable. In determining whether this in-court identification is reliable you may consider such things as [the *Biggers* factors]."
 - "If you determine that the in-court identification of the defendant at this trial is not reliable, then you must not consider that identification."

State v. Dessureault, 104 Ariz. 380 (1969)

- One **VERY** important point about *Dessureault*: it was decided on federal (not state) constitutional grounds. See *State v. Forde*, 233 Ariz. 543, 556–57, ¶¶ 30–32 (2014).
 - If *Dessureault* says something, and later U.S. Supreme Court precedent is silent on the question, then *Dessureault* governs.
 - E.g. jury instruction requirement.
 - **BUT** if later U.S. Supreme Court precedent conflicts with *Dessureault*, the U.S. Supreme Court governs.

State v. Dessureault, 104 Ariz. 380 (1969)

- At least one part of *Dessureault* has, in fact, been abrogated in subsequent U.S. Supreme Court opinions.
- *Dessureault* held that a suggestive identification should be excluded unless State proves that it was reliable by "clear and convincing evidence."
- Later Supreme Court cases have clarified that an identification should be excluded "only if there is a very substantial likelihood of misidentification."
 - *State v. Rojo-Valenzuela*, 237 Ariz. 448, 450, ¶ 7 (2015)

State v. Dessureault, 104 Ariz. 380 (1969)

- If you have a *Dessureault* hearing, **don't rely solely on *Dessureault***. If you do, you'll miss some important changes in the law.
- Look at more recent cases like *State v. Rojo-Valenzuela*, 237 Ariz. 448 (2015), and *State v. Goudeau*, 239 Ariz. 421, 457, ¶ 141 (2016) to provide correct standards.

Three Key AZ Differences

- (1) Arizona imposes a jury instruction requirement. (*Dessureault*).
- (2) Arizona prefers (but do not require) pretrial reliability hearings. (*Dessureault*).
- **(3) Arizona courts are skeptical of Step 1 (Necessity) of due process analysis.**

Misapplication of Necessity Analysis

- Situation 3: A suggestive ID occurs, but the State had no other choice.
- Typically happens when police use a one-man showup because they need to act quickly to catch a dangerous suspect on the loose.
- *Stovall* and *Simmons* (and many lower-court cases like *Sanders*) suggest that this is proper and no reliability analysis is required before admission.
- Arizona courts have been very hostile to this theory.

Misapplication of Necessity Analysis

- *State v. Rojo-Valenzuela*, 235 Ariz. 617, 621, ¶¶ 12-14 (App. 2014) (citations omitted).
 - Suspect shot at a Tucson police officer and fled into residential neighborhood.
 - "Emphasizing law enforcement's pressing need to capture a suspect who had fired on a police officer and taken flight in a residential neighborhood, the state argues the necessity of the show-up rendered a reliability analysis unnecessary."

Misapplication of Necessity Analysis

- *State v. Rojo-Valenzuela*, 235 Ariz. 617, 621, ¶¶ 12-14 (App. 2014) (citations omitted).
 - Court of Appeals rejects that argument.
 - "Given that exigent circumstances attend many if not most suggestive police show-ups, it follows that a reliability analysis would rarely be required if exigency alone could justify the admission of suggestive identifications. We are therefore reluctant to reach such a conclusion in the absence of further guidance from the Arizona or United States Supreme Court."

Misapplication of Necessity Analysis

- State filed a cross-petition for review in the Arizona Supreme Court in *Rojo-Valenzuela*, but was unsuccessful.
- Other Arizona cases show similar skepticism.

Practical Summary

- In almost all cases, your eyewitness IDs should be admissible.
- Eyewitness IDs should be excluded only where there is:
 - (1) improper police conduct; and
 - (2) the ID is unreliable.
- Courts are reluctant to exclude IDs on reliability grounds; even marginal IDs are admissible.

Practical Summary

- Practical tips in Arizona:
 - (1) Don't rely just on *Dessureault*.
 - (2) Make sure to hold a *Dessureault* hearing and give the *Dessureault* instruction on request.
 - (3) Be careful if you're trying to admit a show-up. When in doubt, make sure to argue necessity and reliability.

Outline

- U.S. Supreme Court history
- Current state of the law
- Arizona differences
- Emerging and ethical issues

Ethical Issues

- By now, three things should be clear:
 - You have the tools to admit eyewitness IDs.
 - Most eyewitness IDs will be admitted, even if there are doubts about their reliability.
 - Ultimate determination on reliability will generally be made by the jury.

Ethical Issues



ER 3.8 Comment 1

- "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that . . . precautions are taken to prevent and to rectify the conviction of innocent persons." ER 3.8 Comment 1.

Ethical Issues

- *The problem of wrongful IDs is real.*
- It is possible to study ID procedures in the laboratory and in the real world.
- The following data are pulled from the New Jersey Supreme Court's opinion following the report of the special master in *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

Ethical Issues: Empirical Data

- Police department studies:
 - Data from thousands of actual lineups in Sacramento, CA, and London, UK.
 - London:
 - 41% of witnesses IDed no one, 39% of IDed the suspect, and 20% IDed a filler subject.
 - Sacramento:
 - 33% of IDed no one, 51% IDed suspect, and 16% IDed a filler subject.
 - In other words, about one third of the London witnesses—and about one quarter of the Sacramento witnesses—identified an obviously innocent person.

Ethical Issues: Empirical Data

- Fake crime studies:
 - A researcher goes to a bank or a store, chats with the clerk, and exchanges a check.
 - 2 to 24 hours later, another researcher approaches, claims to be investigating, and presents a 6 person photo lineup.
 - On average 42% of clerks made the correct ID, 41% IDed an innocent filler, and 17% chose to ID no one.
 - In some versions of the study, the lineups shown to the clerks were all innocent fillers. In these circumstances, 64% made no identification and 36% picked an innocent filler.

Ethical Issues: Empirical Data

- Laboratory studies produce similar results.
 - A 2001 meta-analysis compared "studies in which knew they were participating in experiments and those in which witnesses observed what they thought were real crimes[.]" *Henderson, 27 A.3d at 893.*
 - Data in both studies were "remarkably consistent: in both sets of studies, 24% of witnesses identified fillers." *Id.*

Ethical Issues: Empirical Data

- Why do witnesses ID the wrong person?
 - Memory is malleable.
 - Subjects watched video a car wreck. Some were then asked to estimate how fast cars were going when they "smashed" together. Others were asked how fast the cars were going when they "collided, bumped, hit, or contacted." The first group estimated the cars were going about 9 mph faster than the second group.
 - "Relative judgment" effect: people tend to ID whoever looks most like the perpetrator in the lineup.

Ethical Issues: Factors Improving Reliability

- Double blind lineups
 - Administering officer doesn't know who the suspect is; Helps reduce intentional and unintentional cues to the witness.
- Witness instructions
 - Tell witness that the suspect might not be in the lineup and they don't have to make ID.
- Minimum of 5 fillers, all of whom look like the suspect.
- Avoid confirmatory feedback
 - Don't tell witness they got it "right."
- Avoid multiple viewings
 - Remember Foster, the leather-jacket case.

Ethical Issues: Factors Improving Reliability

- Longer time to view suspect
- Short distance, good lighting.
- Speedy identifications (within 10 to 12 seconds of seeing the lineup) appear to correlate with accuracy.

Ethical Issues: Factors Harming Reliability

- Presence of a weapon
 - According to meta-analysis, decreases reliability by about 10%
- Witness's alcohol use.
- Witness's age:
 - Children more susceptible to suggestion.
 - Old people are less accurate.
 - "Own Age Bias": Witnesses are better IDing people their own age.
- Disguises, hats, and masks.

Ethical Issues: Factors Harming Reliability

- Passage of time
 - The longer you wait, the less reliable the memory.
- Cross-racial
 - People have more difficult identifying subjects of a different racial group.

Ethical Issues: Factors That Cut Both Ways

- Showups
 - Generally harm reliability *unless* showup takes place within 2 hours of the incident; "the benefits of a fresh memory seem to balance out the risks of undue suggestion." *Henderson*, 27 A.3d at 903.
- Stress
 - "Moderate" stress improves accuracy, but "high" stress harms it.

Ethical Issues: Factors With Unclear Effect

- Sequential v. simultaneous lineups.
 - There's still debate about which is better.
- Composite sketches.



Ethical Issues: What Does This Mean for You?

- Despite some issues, the overwhelming majority of identifications are admissible under current law.
- Keep using lineups and showups, but:
- Make sure the jury is hearing the full story.
- Incorporate skepticism of lineups in your charging decisions.

Ethical Issues: Good Practice is Good Advocacy

- Even if you're skeptical about the data I've presented, you'll have a stronger case if your officers are using best practices.
- Q. And what is the purpose of [double-blind lineups]?
- A. So defense attorneys don't accuse us of tipping off a witness inadvertently by coughing or if they put their hands up or do something.

Questions